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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

JAMES E. HARLESS,
Petitioner

vs.

STATE OF IOWA,
Respondent

BRIEF IN BEHALF OF STATE OF IOWA, RESPONDENT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

From a conviction of attempted breaking and entering (under Section 708.10, 1954 Code of Iowa) and being a habitual criminal (under Section 747.5, 1954 Code of Iowa) petitioner appealed to the Supreme Court of Iowa. On appeal three issues were raised and decided. They were (1) sufficiency of the evidence to sustain the conviction of attempted breaking and entering; (2) admissibility of certain demonstrative evidence found in the automobile

possessed by petitioner at the time of his arrest; and (3) alleged misconduct of the prosecuting attorney who referred to petitioner as a "professional criminal" in argument to the jury. The Supreme Court of Iowa affirmed the conviction.

Shortly thereafter a petition for rehearing was filed. In this petition the only issue argued was the admissibility of certain exhibits, which petition was denied without opinion on January 17, 1958.

Now petitioner asks that a writ of certiorari be granted to review the holding of the Iowa Supreme Court. His contention is that the evidence was insufficient to sustain a conviction, thereby depriving him of his right to a fair trial in accordance with the Fourteenth Amendment to the United States Constitution.

ARGUMENT

I

Petitioner asserts that the State failed to show that a crime was committed, and also, that the State failed to establish the corpus delicti. Further, it is asserted that the decision of the Supreme Court of Iowa was arbitrary and offensive to the fundamental ideas of fairness and right and contrary to the Fourteenth Amendment to the United States Constitution.

It is claimed by the petitioner that he was deprived of a fair trial in that there is no evidence that a crime was committed. Actually, this claim is based on the issue of sufficiency of the evidence. Both the trial court and highest state court ruled on the sufficiency of the evidence. In both instances the evidence was held sufficient.

However, neither the trial court nor the highest state court ruled on the issue that the petitioner was or was not accorded a fair trial because of insufficiency of the evidence. The only issue raised and decided with regard to a fair trial was whether the alleged misconduct of counsel deprived petitioner of a fair trial. It was held that reference to the accused as a "professional criminal", when he was charged with being a "habitual criminal", did not prevent a fair trial.

Therefore, respondent first urges that the issue presented herein was *not* raised in either the trial court or the Iowa Supreme Court. Certainly such an issue was not raised in terms of constitutional grounds. At no place in the record, or appellant's brief and argument in the Iowa Supreme Court, is there any assertion of a due process question. For United States Supreme Court jurisdiction it is fundamental that the question must have been raised and decided in the state courts. This basic principle applies with equal force where review is sought by certiorari. For this reason the petition for certiorari is subject to denial. *Michel v. State of Louisiana*, 76 S. Ct., 350 U. S. 91, 100 L. Ed. 83; *Walters v. City of St. Louis*, 74 S. Ct. 505, 347 U. S. 231,

98 L. Ed. 660; *Copperweld Steel Co. v. Industrial Commission of Ohio*, 65 S. Ct. 1006, 324 U. S. 780, 89 L. Ed. 1363; *Dewey v. City of Des Moines*, 19 S. Ct. 379, 173 U. S. 193, 43 L. Ed. 665.

II

As a foundation for jurisdiction petitioner relies on subparagraph 1(a), Rule 19, Revised Rules of the Supreme Court of the United States, which says certiorari may be granted:

> "(a) Where a state court has *decided a federal question* of substance not theretofore determined by this court, or has *decided* it in a way probably not in accord with applicable decisions of this court." (Emphasis added)

First, reference is made to Division I wherein respondent contends this court is without jurisdiction in that the state courts did not consider or *decide* the question asserted by petitioner.

Respondent further contends that even if such a question were decided it was not a *federal question*. The Supreme Court of Iowa held that the circumstantial evidence of identity was sufficient. Such sufficiency was based on state authorities: *State v. Lowenburg*, 216 Iowa 222, 243 N.W. 538; *State v. Manly*, 211 Iowa 1043, 233 N.W. 110; *State v. Hester*, 205 Iowa 1047, 218 N.W. 616; *State v. Atiey*, 149 Iowa 196, 128 N.W. 343. A decision resting on adequate state authorities affords no basis for a writ of certiorari. *Hammerstein v. Superior Court of California in Los Angeles County*, 71 S. Ct. 521, 340 U. S. 622, 95 L. Ed. 586.

Additionally, under the portion of Rule 19 above stated, in order to invoke the jurisdiction of the United States Supreme Court the question submitted must not have been theretofore determined by such court. A review of certain decisions conclusively shows the question of sufficiency of the evidence as a denial of due process has been considered and determined. In *Bell Telephone Company of Pennsyl-*

vania v. Pennsylvania Public Utility Commission, 60 S. Ct. 411, 309 U. S. 30, 84 L. Ed. 563, the United States Supreme Court, in a per curiam opinion, commented as follows:

". . . Its contentions are (1) that the commission's order is *wholly without support in the evidence and thus constitutes a denial of due process contrary to the Fourteenth Amendment;* (2) that the order based on discrimination only, and prescribing rates not found to be reasonable and depriving appellant of considerable revenue, is *arbitrary* and hence a denial of due process, . . .

"As to the first contention, it appears that the state court heard the appeal judicially and decided that there was evidence justifying the finding of the commission of unreasonable discrimination in the transaction of its intra-state business. *In the absence of other constitutional objections, it cannot be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of violation of state law with respect to the conduct of local affairs. The contention that such a decision is erroneous does not present a federal question. Arrowsmith v. Harmoning*, 118 U. S. 194, 196; *Bonner v. Gorman*, 213 U. S. 86, 91; *American Railway Express Co. v. Kentucky*, 273 U. S. 269, 273.

* * *

"The appeal is dismissed for want of a substantial federal question." (Emphasis supplied)

For additional authority in support of this proposition reference is made to *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 72 S. Ct. 842, 343 U. S. 390, 97 L. Ed. 1022, and *Barrington v. Missouri*, 27 S. Ct. 582, 205 U. S. 483, 51 L. Ed. 890.

In view of the above cited cases it appears that the question presented has been foreclosed by prior decision of this court. There is, therefore, no basis on which jurisdiction can be founded. *Equitable Life Assurance Soc. v. Brown*, 23 S. Ct. 123, 187 U. S. 308, 47 L. Ed. 190.

III

Petitioner, under "Reasons Relied on for Allowance of Writ", asserts a number of repetitious generalizations which in no way specifically set out what insufficiencies in the evidence deprived him of a fair trial. These general statements are that there can be no conviction unless there is a crime; that the burden of proof is on the state; and that to convict a person without proof of a crime is a deprivation of due process.

All of these averments are without merit, and all are of a general and repetitious nature with one exception. That exception is shown below:

> "There is no testimony or evidence in the record that the owner or owners, or any employee, of said market ever claimed an attempt to break and enter the market. To establish the corpus delicti, the prosecution would have to show, by some person, the condition of the market prior to the alleged attempt to break and enter. Testimony from people having no connection with the market that a 'burglar alarm' was ringing certainly does not prove the corpus delicti."

Essentially these statements are mere averments without any color of a federal question or meritorious claim. As stated in *Clark v. McDade*, 17 S. Ct. 284, 165 U. S. 168, 41 L. Ed. 673, these must be more than a general statement:

> "A general statement that the decision of the court is against the constitutional rights of the objecting party or against the Fourteenth Amendment, or that it is without due process of law, particularly when these objections appear only in specifications of error, so called, will not raise a federal question even when the judgment is a final one within the section of the new Revised Statutes above mentioned. There must be at least some color of a federal question. Hamblin v. Western Land Co., 147 U. S. 531."

CONCLUSION

Sufficiency of the evidence as related to a fair trial and due process of law was not in issue and was not decided by either the trial or State Supreme courts. There was no substantial federal question in that the decisions of the state courts were based on state precedents. In addition, the United States Supreme Court has previously decided that sufficiency of the evidence as a due process matter is not a federal question. For these reasons none of the jurisdictional prerequisites for granting a writ of certiorari under Rule 19, New Revised Rules of the Supreme Court of the United States, have been met by the petitioner.

Moreover, a bare averment of deprivation of due process or deprivation of a constitutional guarantee is inadequate, and this court will not grant certiorari on the basis of such a non-meritorious contention.

Therefore, respondent asks that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPEARANCE

I, Freeman H. Forrest, a member of the Bar of the Supreme Court of the United States, do hereby enter my appearance as counsel for the State of Iowa, Respondent.

FREEMAN H. FORREST
State House
Des Moines, Iowa

PROOF OF SERVICE

I, James E. Harless, Pro se, hereby acknowledge receipt of a copy of the foregoing Brief in Behalf of State of Iowa, Respondent, in Opposition to Petition for Writ of Certiorari, this ..... day of ....., 1958.

.....
Attorney, Pro se